

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: **July 7, 2000**
Case No.: **1999-INA-279**
CO No.: **P1997-MD-03046**

In the Matter of:

JAWAHAR SINGH
Employer,

on behalf of:

BAKUL CHAKRABORTY
Alien.

Appearances: Michael B. Schwartz
For Employer and Alien

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

Under section 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

This case was previously before a panel of the Board on April 5, 1999, under Docket Number 1999-INA-070 and the Decision and Order issued at that time is incorporated herein by reference.

In the original application in this case ("ETA 750A"), Employer sought certification to employ Bakul Chakraborty ("Alien") to fill the position of Domestic Cook with the following duties:

Plans and prepare meals for family and guests for personal and business gatherings on regular basis. Inventories kitchen adequate supplies, utensils and foodstuffs for meal preparation. Orders necessary ingredients for preparation of food. Maintains kitchen in orderly condition. (AF 40).

Additionally, the job requirements for this position were two years of experience in the job offered or related employment experience. (AF 40).

On September 14, 1998, the CO issued a Final Determination ("FD") denying labor certification. (AF 26-27). The CO found Employer to be in violation of § 656.3, which defines employment as permanent full-time work by an employee for an employer other than oneself. On April 5, 1999, the Board remanded this application to the CO with instructions to issue a supplemental Notice of Findings ("NOF") consistent with the guidelines established in the case of *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). (AF 19-21).

On May 4, 1999, the CO issued a [supplemental] NOF proposing to deny labor certification. (AF 16-18). The CO found Employer to be in violation of § 656.20(c)(8), which requires that the job opportunity be clearly open to any qualified U.S. worker. The CO noted further that Employer's application contained insufficient information to determine whether the position of domestic cook actually existed or whether the job was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

The CO instructed Employer to explain in rebuttal why the position of domestic cook in his household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of classifying the alien as a "skilled worker." The CO further instructed that Employer's rebuttal documentation must include all requested documentation as well as responses

to a series of questions posed in the NOF. The CO explained that Employer's documentary evidence along with his responses to the questions posed would be reviewed as a whole to determine whether the position of domestic cook actually existed in its household. (AF 16-18).

On July 8, 1999, Employer submitted a rebuttal to the [supplemental] NOF. (5-15). Employer asserted that the CO failed to address the issues raised in *Daisy Schimoler*, *Carlos Uy III* and other decisions of the Board. Moreover, Employer argued that his response and three paged duly notarized affidavit dated September 3, 1998, to the CO's initial NOF, "fully and sufficiently addressed all issues relating to the bona fide nature of the subject employment position." (AF 5-6). Employer therefore re-submitted these documents. (AF 7-12). Additionally, Employer, stated that "the inquiries set forth on pages (2) and (3) of the NOF relate solely and directly to the issues '...questioning the hours in which a worker will actually be engaged in work-related duties...' and not whether a bona fide job opportunity exists." (AF 6). As a result, no documentation was submitted by Employer in response to the questions posed in the [supplemental] NOF.

On July 14, 1999, the CO issued a Final Determination ("FD") denying certification. (AF 3-4). The CO noted that Employer's rebuttal, which rather than respond to the questions raised in the [supplemental] NOF, referred instead to the three page affidavit submitted in response to the initial NOF, did not establish that there was a bona fide position for a domestic cook in his household. (AF 4). The CO indicated Employer's failure to submit any additional documentary evidence regarding possible family entertainment schedules, as well as explain or document the need for the employment of a full time cook when in fact most members of the Employer's household are outside of the home working or attending school for the greater part of the alien's work day, thus leaving no one home to eat most of the meals that the alien supposedly would prepare and serve, demonstrated that it was more likely that the alien would be employed as a general houseworker rather than as a domestic cook. *Id.*

On July 26, 1999, Employer filed a request for review of the denial of certification. (AF 1-2). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

DISCUSSION

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), *cited in*, *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

In the [supplemental] NOF dated May 4, 1999, the CO in attempting to ascertain whether a bona fide job opportunity actually was offered, directed Employer to explain why the position of

domestic cook in his household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of immigration. (AF 16-18). The CO in utilizing this “totality of the circumstances” test, posed a series of questions to Employer and explained that Employer’s documentary evidence along with his responses to the questions posed would be reviewed as a whole to determine whether the position of domestic cook actually existed in the household. (AF 17).

However, in rebuttal, Employer, rather than submit responses to the CO’s inquiries, instead re-submitted a three page affidavit and response which he had previously submitted in response to the initial NOF (AF 7-12). Thus, Employer remained silent upon many of the issues for which the CO posed questions, and therefore a thorough inquiry into the “totality of the circumstances” could not take place.

20 CFR § 656.25 (e)(3) provides that the Employer’s rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted are deemed admitted. *Our Lady of Guadalupe School*, 1988-INA-313 (June 2, 1989); *Belha Corp.*, 1988-INA-24 (May 5, 1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993). Furthermore, if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *See Gencorp*, 87-INA-659 (Jan. 13, 1988)(en banc).

In view of the foregoing, we find that Employers’ application for labor certification remains in violation of § 656.20 (c)(8). Accordingly, we find the CO’s denial of labor certification was proper and the following Order shall enter.

ORDER

The Certifying Officer’s denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.